30 November 2012
2nd Annual Report to
Employee Misclassification Advisory Task Force
Research & Resources Committee

The Research & Resources Committee (RRC) addresses the following issues in its second annual report. These topics originate in Tenn. Code Ann. 50-6-919 (2011) and extend the review of issues 1 to 7 addressed in the Task Force's First Annual Report (2012)

8. New strategies for systematically investigating the failure of employers to properly classify individuals as employees

9. Whether improvements are needed to facilitate the filing of complaints and identify potential violators, including, but not limited to, soliciting referrals and other relevant information from the public

10. Changes in the laws, if any, that need to be made in order to ensure that agencies represented by task force members investigating the failure of employers to properly classify individuals as employees under their own statutory or administrative enforcement mechanism have the authority to refer a matter to other participating agencies for assessment of potential liability under the other agencies' relevant statutory or administrative enforcement mechanisms

11. Innovative ways to prevent misclassification of employees by employers, such as through disseminating educational materials regarding the legal differences between independent contractors and employees

12. Methods by which public awareness of the illegal nature and harms inflicted by the failure of employers to properly classify individuals as employees can be increased

13. Any other issues relative to employee misclassification in the construction industry

The RRC's contribution to the Task Force's mission primarily reviews the following domains: objective academic research, legislation, task forces, and enforcement. This RRC report provides a brief summary of information derived from research in each domain and is complemented by detailed appendices.

Appendices
A: State Legislation 2010 & Earlier
B: State Legislation 2011 & 2012
C: Survey of Research on Employee Misclassification
D: State Enforcement Initiatives
E: State Task Forces & Outcomes

Tenn. Code Ann. 50-6-919 (2011): Task Force Issues

Issue 8:
Numerous states (Appendices A & B) have utilized academic researchers with established objective professional reputations as a means to develop comprehensive descriptions of Employee Misclassification & Underreporting and estimates of the impact these practices have on state revenues for unemployment insurance, workers' compensation premiums and taxes. Using multiple empirical research methods, these

studies provide, in sum, a rich comparative body of objective data on the extent of misclassification.

States implementing multi-agency fraud detection data sharing and data mining methods, such as Washington and Louisiana, have demonstrated the utility of these strategies for identifying the extent of employer misclassification, but also confirmed the practicality of these methods for identifying individual employers and broader networks of systematic illegal activity linked to payroll fraud (Appendix D & E).
Current investigations remain hampered by lack of access to information reported to the National Council on Compensation Insurance (NCCI) regarding details of coverage for specific employers.

Recommendations: The RRC recommends adoption of integrated data management and sharing between Tennessee Agencies and external sources in order to assist investigation and enforcement. The RRC recommends funding of continued research by objective academic researchers to determine the extent of misclassification and under reporting of employees throughout the Tennessee economy. The RRC recommends that Tennessee provide certified training on both civil and criminal investigative techniques to ensure that state agency investigators perform thorough and complete investigations that meet industry recognized standards.

Issue 9:
States making substantial improvements to complaint filing procedures have experienced marked improvements in identifying employers who practice misclassification (Appendices A & B). Incorporation of economic incentives and aggressive use of multiple modes of reporting, including social media and internet domains, facilitates existing agency based resources for identifying misclassification practices. Improved communication with local government officials, particularly with regard to the range of negatives community consequences, including costs, presents a significant opportunity for inter-governmental cooperation and collaboration. Local knowledge of construction activity and incentives to local officials can provide a more extensive use of trained and experienced local officials at low cost and higher reliability than other sources of information.

Recommendation: The RRC recommends investment in communication and education strategies that enhance the incentives and opportunities for the general public to be aware of these misclassification practices and report them to the appropriate state agencies.   Incentives for reporting should be matched with guarantees of protection and immunity, particularly given that misclassified employees may have an undocumented work status that presents disincentives to reporting.

Issue 10:
Thirty-four states have adopted pro-law enforcement measures to address payroll fraud, including stop work orders, penalties for failure to classify employees, administrative

penalties for workers' compensation premium avoidance, funding for special prosecutors, and penalties for money service businesses linked to payroll fraud. (Appendix D & E).

At present, Tennessee's lack of administrative monetary penalties makes curbing employee misclassification difficult. Current Tennessee law does not authorize the TDLWD to assess administrative monetary penalties against employers for workers' compensation premium avoidance (See 2012 Annual Task Force Report). Current Tennessee law does not authorize TDLWCD to issue stop work orders to offending employers (See 2012 Annual Task Force Report).

Recommendation: The RRC recommends that Tennessee pass legislation modeling those states, in particular states in the South East such as Florida and Louisiana, that have made significant progress in identifying misclassification, reducing payroll fraud, and increasing state revenues previously lost due to fraud. The RRC recommends extension of the current Task Force's mandate to address issues related to employee misclassification in industries other than construction.

Issue 11:
The RRC cedes to the Task Force any initiative on this Issue given that other committees and the Task Force leadership has solicited proposals and reviewed a variety of alternative technologies and methods for using system software and multi-agency intergovernmental coordination to address innovations.

Issue 12:
The RRC recognizes Task Force initiatives, including a website and fraud tip line and tip form that became operational in 2012, as important steps addressing this issue.

Social Media networks present a low cost high impact opportunity for Tennessee to incorporate developing non-traditional media for communicating laws and regulations relevant to misclassification practices. These social networking media have high currency with target populations most likely to be aware of employers engaging in payroll fraud. Face Book presents one opportunity. Twitter offers another low cost information medium with high potential to inform widely dispersed construction employees and employers.

Recommendations:
RRC recommends that the Task Force study social media as a methodology for increasing public awareness of misclassification's illegal and harmful economic and social impact on Tennessee.

The RRC recommends that Tennessee add a test question to the contractor's licensing exam and that this be an item on the licensing applications. The substance of the question and application item would focus on awareness of the employee definition -

Mark "yes" or "no." This format would be consistent with other questions on the Licensing Board applications.

The RRC recommends that there be a fact sheet for the "employee and/or anyone hired" similar to the employment package with the W2 form. This would parallel current TOSHA postings Requirements and present a minimal cost since the forms may be duplicated using current photocopy technology.

Issue 13:
Columbia University Law School National State Attorneys General Program is collecting resource materials from investigators and prosecutors familiar with payroll fraud cases. They are planning to assist law enforcement by providing access to those materials on a dedicated web site.

A significant aspect of employee misclassificaiton originates with unfair construction contractors from other states, like Georgia for instance, who work in Tennessee and violate Tennessee law.

Recommendations:
The RRC recommends that the resource web site should be accessed for education purposes by Tennessee officials. Also, as permitted by law, Tennessee law enforcement personnel should provide appropriate materials to the web site to assist their colleagues in other states as well.

The RRC recommends that task force members establish routine lines of communications with their counterparts in other states to facilitate information sharing and law enforcement coordination.